92-369

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THEODIS MILLBROOK, Petitioner

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

What is the proper definition of "prevailing party" under the Equal Access to Justice Act?

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Appellant petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is attached hereto as Appendix A. The Order denying Petition Rehearing is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered June 26, 1992. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of 28 U.S.C.A. § 2412 are set forth in Appendix C.

STATEMENT

This case concerns 28 U.S.C.A. § 2412, which involves attorney's fees and costs under the Equal Access to Justice Act. The history of this case is lengthy and complex.

Theodis Millbrook filed a claim for Social Security disability benefits and he was placed on the disability roles on April 20, 1976. He was later informed by Social Security that his disability had ceased in November 1981, and his monthly benefit checks were stopped effective January 1982. Mr. Millbrook did not appeal this determination, but instead filed a new application for disability

insurance benefits in July 1982, alleging an onset date of April 1976.

The July 1982 application was denied through all administrative steps, and a civil action was commenced in the United States District Court for the Eastern District of Arkansas. The District Court denied this claim in December 1984, and Mr. Millbrook appealed to the United States Court of Appeals for the Eighth Circuit. The U.S. Court of Appeals denied the claim in December 1985. Millbrook v. Heckler, 780 F. 2d 1372 (8th Cir. 1976).

In January 1986, Mr. Millbrook filed a new application for disability insurance benefits, once again alleging an onset date of April 1976. This claim was denied through all the administrative steps and Mr. Millbrook appealed it to the U. S. District Court for the Eastern District of Arkansas in January 1988.

In May 1988, the District Court remanded the case to the SSA for further

administrative proceedings. A supplemental hearing was held before an Administrative Law Judge (ALJ), who subsequently denied the claim for benefits. The ALJ's decision was adopted by the Appeals Council in the early part of 1989. Mr. Millbrook sought judicial review of the Appeals Council's decision, which resulted in a second remand from the District Court to SSA in June 1990.

Another hearing was held before an ALJ in November 1990, but the ALJ once again denied the claim for benefits. Mr. Millbrook appealed the ALJ's decision, and in November 1991, the Appeals Council remanded the claim once again to the ALJ for further proceedings.

Another hearing was held in January 1992 after which the ALJ issued a decision wholly favorable to Mr. Millbrook. In his decision, the ALJ concluded that Mr. Millbrook had continuously been disabled since his original period of disability.

began, and that he was entitled to benefits from the time SSA originally stopped his check until the present time.

In May 1992, Mr. Millbrook filed with the U. S. Court of Appeals for the Eighth Circuit a petition for attorney's fees and costs pursuant to the Equal Access to Justice Act, requesting fees and costs for all services performed subsequent to January 18, 1985--the date claimant appealed his July 1982 application to the U. S. Court of Appeals.

On June 26, 1992, the U. S. Court of Appeals denied Mr. Millbrook's motion without any explanation (Appendix A). Mr. Millbrook filed a Petition for Rehearing on July 7, 1992, which was denied by the Court on August 6, 1992 (Appendix B).

REASONS FOR GRANTING THE PETITION

The U. S. Court of Appeals for the Eighth Circuit denied Theodis Millbrook's motion for attorney's fees and costs under the EAJA without explanation. The

question as to whether Mr. Millbrook is entitled to an award of attorney's fees and costs under the EAJA turns on whether Mr. Millbrook can be considered "a prevailing party" under the EAJA.

The Courts which have decided this issue have held that a claimant becomes a "prevailing party" when an affirmative decision is made that he is entitled to the benefits he seeks. Rollins v. Sullivan, 784 F. Supp. 253 (E.D. Pa. 1991); Brown v. Secretary of Health and Human Services, 747 F. 2d 878 (3d Cir. 1984); McGill v. Secretary of Health and Human Services, 712 F. 2d 28 (2d Cir. 1983); Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989); Texas State Teacher Association v. Garland Independent School District, 109 S. Ct. 1486 (1989); Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986).

Mr. Millbrook's status as a "prevailing party" is not dependent on an affirmative court decision. Rather, the

key factor is that the claimant ultimately received the benefits he sought for the period of time originally appealed to the Court in Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986).

In Green v. Bowen, 877 F. 2d 204 (2d Cir. 1989), the Second Circuit Court of Appeals "[found] nothing in the EAJA that requires that a party prevail in a civil action reviewing a final agency determination." Citing the United States Supreme Court's decision in Texas State Teachers Association v. Garland Independent School District, 109 S. Ct. 1486 (1989), the Second Circuit concluded that if the claimant succeeded on a significant issue in litigation and achieved some of the benefit he sought in bringing suit, he was entitled to an award under the EAJA.

Though the Eighth Circuit Court of Appeals gave no explanation for its denial of Mr. Millbrook request for fees and

costs under the EAJA, it was apparently because the Court felt he had not attained prevailing party status. But, if a claimant achieves success on a significant issue, either in or out of Court, then he is a prevailing party so long as this success was not completely unrelated to the litigation.

The only occasions where attorney's fees have not been granted have been when the claimant's only success is on a claim not originally sought in the litigation, Swedberg v. Bowen, 804 F. 2d 432 (8th Cir. 1986), or when success resulted solely from an independent change in law such that the claimant would have received the requested benefits even if suit had never been filed. Solely v. Bowen, 873 F. 2d 1153 (8th Cir. 1989).

In the case at hand, the ultimate success of the claim was directly related to the litigation. Mr. Millbrook ultimately prevailed on the exact issue

pursued through the litigation in Millbrook v. Heckler, 780 F. 2d 1371 (8th Cir. 1986). The Social Security Administration ultimately reversed their previous denials of the claim filed in Millbrook and allowed the claimant to prevail on all issues.

The purpose of the EAJA is to encourage government agencies to act in an equitable manner and not to unreasonably create the necessity for litigation. Brown v. Secretary of Health and Human Services, 747 F. 2d 878 at 880 (3d Cir. 1984), (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12 reprinted in 1980 U.S. Code Cong. and Ad. News, 4953, 4991). This case supports the legal principal that attorney's fees be awarded to Mr. Millbrook for prevailing on the issue of the cessation of his disability and termination of his disability benefits in 1982.

In Texas State Teachers v. Garland Independent School District, 109 U.S. 1486, 1493 (1989), the U. S. Supreme Court stated:

> " . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under Hensley, not to the availability of a fee award vel non."

It is Mr. Millbrook's overall success which should be viewed in this instance. He was ultimately awarded all benefits which he sought, after ten years of litigation! He is a prevailing party for the purposes of an award of attorney's fees even though it was not the Court that made the award, but rather the administrative agency.

Here is the irony of this case: a party has a claim against an administrative agency; the claimant loses all the way through the Courts. Next, the

claimant refiles alleging the original onset date, then the agency agrees with the claimant and awards benefits that the claimant sought in the initial claim.

But when the agency is requested to pay the costs and attorney's fees under the EAJA because the claimant was a prevailing party, the agency says: "No." We ask the Court to say: "Yes." Because to do otherwise would leave a "loophole" in the EAJA award system.

To avoid an inequitable result, Theodis Millbrook urges the Court to grant his Petition for a Writ of Certiorari so that there will be consistency among all circuits as to the proper definition of "prevailing party" under the EAJA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

ORIGINAL SIGNED BY
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August 25, 1992.

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO. 85-1112EA	*	
	*	
Theodis Millbrook,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court for
vs.	*	the Eastern
	*	District of
Secretary of Health	*	Arkansas
and Human Services,	*	
	*	
Appellee	*	

Appellant's motion for EAJA attorney fees and expenses has been considered by the court and is denied.

June 26, 1992

Order Entered at the Direction of the Court:
/Michael E. Gans/
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

NO. 85-1112EA	*	
	*	
Theodis Millbrook,	*	
	*	Appeal from the
Appellant,	*	United States
	*	District Court for
vs.	*	the Eastern
	*	District of
Secretary of Health	*	Arkansas
and Human Services,	*	
	*	
Appellee	*	

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 6, 1992
Order Entered at the Direction of the Court:
/Michael E. Gans/
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

28 U.S.C.A. § 2412 provides:

"**§ 2412. Costs and fees**

(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

. . . . "